

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 35 of 1996
and
Appeal From Order No.45 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BRIJMOHAN JAMNADAS PACHISIA

Versus

RAJENDRA JIVANLAL DAMANI

Appearance:

M/S TRIVEDI & GUPTA for Petitioner
MR MUKUL SINHA for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 27/02/96

ORAL JUDGEMENT

Admit.

Dr.Mukul Sinha, Advocate for the respondent waives service. At the request of the learned Advocates of the parties, these Appeals From Order are taken up for final hearing to-day.

The present appeals are directed against the order dated 29th December, 1995 passed by the learned City Civil

filed by the respondent herein for claiming an amount of Rs.11932/- under the provisions of Order 37, Rule (2) of the Civil Procedure Code, and thereby the learned City Civil Judge has dismissed the aforesaid applications preferred by the appellants for restoration of the original Summary Suit No.2485/94 and for setting aside the ex-parte decree passed on 28th October, 1994.

The appellants filed the aforesaid applications under Order 9 Rule (13) of the Civil Procedure Code setting out the reasons for setting aside the ex-parte decree by inter alia pointing out that the appellants received the summons on 10-8-1994. They appeared through their Advocate on 19-8-1994. Thereafter the matter was adjourned from time to time and ultimately on 16-9-94 when it was placed for summons for judgment, the appellants' Advocate sought adjournment for submitting leave to defend. Thereafter the Advocates for the appellants submitted leave to defend and obtained their signatures and they were informed that as and when the matter will come up on the board, they will be informed accordingly. However, when the appellants received Caveat Application on 14-12-1994 sent by the respondent, they inquired from the Court and found that the said matter came up on board on 28-10-1994 . However, as the Clerk of the Advocate could not see the number of the matter on the Board of 28-10-1994 through inadvertance, he could not inform his Advocate and as a result thereof, on 28-10-1994 when the matter came up for hearing, the Advocate for the appellants could not file any

application or written statement and the Court ex-parte passed an order in favour of the respondent dismissing the aforesaid two applications.

Having heard the learned Advocates , I am of the view that the ex-parte decree came to be passed against the appellant on account of the negligence on the part of the Clerk of the Advocate. The concerned clerk Deepak Jethabhai Parmar has also filed an affidavit wherein he has clearly admitted that due to inadvertance, he did not notice the number of the matter on the Board of summary suits and therefore could not inform his Advocate. There is no reason to disbelieve the same. Because of the negligence on the part of the Clerk of the Advocate the litigants should not suffer. I am, therefore, of the opinion that the ex-parte decree

passed against the appellants is required to be set aside. It is equally true that because of the negligence on the part of the Clerk of the Advocate or the Advocate, the respondent, who was once an employee of the appellants and who has filed the present suit for recovery of his dues when he was in employment, should also not be put to disadvantage. Considering this aspect of the case, ends of justice will be met with if the matter is remanded to the trial Court for fresh decision on merits and the amount of Rs. 12999/- deposited by the appellant as against the claim of the respondent to the tune of Rs. 11932/- is permitted to be withdrawn by the respondent subject to the result of the suit. Hence the following order is passed.

4

These appeals are allowed with no order as to costs. The impugned ex-parte order dated 28th December, 1994 dismissing Civil Miscellaneous Applications Nos. 862 and 863 of 1994 filed in Darkhast Proceedings, passed by the learned City Civil Judge, Ahmedabad is set aside and the original suit is restored to the file. Leave to defence is granted. The learned City Civil Judge, Ahmedabad is directed to decide Summary Suit No. 2485/94 afresh after hearing the parties on merits and in accordance with law. The respondent is permitted to withdraw Rs. 12999/- deposited in the trial Court by the appellants on the condition that in the event of the suit being dismissed, he shall return the same at such rate of interest as may be fixed by the trial Court at the end of the trial. The respondent will file an undertaking to that effect within 15 days from today.

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